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No. 85-1928

In The
Supreme Court of the United States
October Term, 1985

STATE OF DELAWARE,
Petitioner,

v.

PERCY E. WAINWRIGHT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DELAWARE SUPREME COURT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
A. The Legal Issue	1
B. The Factual Record	5

TABLE OF AUTHORITIES

Page

CASES

East v. State, 702 S.W.2d 606 (Tex. Crim. App. 1985) 2

Edwards v. Arizona, 451 U.S. 477 (1981) 1

Harrison v. United States, 392 U.S. 219 (1968) 6

Koza v. State, 718 P.2d 671 (Nev. 1986) 2

Oregon v. Elstad, 105 S.Ct. 1285 (1985) 6

People v. Longoria, 717 P.2d 497 (Colo. 1986) 4

People v. Spring, 713 P.2d 865 (Colo. 1985) 4, 5

Rhode Island v. Innis, 446 U.S. 291 (1980) 1, 2

State v. Conover, 509 A.2d 1201 (Md. June 10, 1986) 2

State v. Taylor, 490 So.2d 459 (La. App. 1986) 2

State v. Williams, 333 S.E.2d 708 (N.C. 1985) 3

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In this petition, the State of Delaware asks this Court to determine what constraints *Miranda* imposes upon the police practice of telling a suspect the evidentiary basis for his arrest.

A. The Legal Issue

1. Respondent does not argue that the interplay between disclosure of evidence and "interrogation" under *Miranda* is not an important issue. Indeed, respondent suggests that the question should be broadened. He asserts that *Edwards v. Arizona,* 451 U.S. 477 (1981) overruled *Rhode Island v. Innis,* 446 U.S. 291 (1980). According to him, the permissibility of police conduct after the

suspect has requested an attorney is to be measured, not by the *Innis* definition of "interrogation," but rather an inquiry whether the conduct was police "initiated" contact. Br. in Opp. at 22-23.[1]

2. Most importantly, the courts continue to struggle with applying the *Innis* definition of interrogation to police practices of informing the suspect of the evidentiary basis for his arrest. Since the opinion below, Nevada has chosen to follow the approach of requiring a case-by-case appraisal of the supposedly "evocative" nature of the disclosure. *Koza v. State*, 718 P.2d 671, 674-75 (Nev. 1986). However, the Maryland Court of Appeals has decided to review the decision in *State v. Conover* (reproduced at Pet. App. 22), the latest in a line of Maryland intermediate appellate court opinions relied upon by the Delaware Supreme Court in this case. *State v. Conover*, 509 A.2d 1201 (Md. June 10, 1986) (granting pet. for cert.).

In contrast, Texas has taken the view, under a state statute implementing *Miranda*, that responses prompted by the delivery of a capital murder indictment to a suspect are not the products of impermissible interrogation. *East v. State*, 702 S.W.2d 606, 613-14 (Tex. Crim. App. 1985). *See also State v. Taylor*, 490 So.2d 459, 460 (La. App. 1986) (after suspect invoked right of silence, explanation of what investigation would entail not impermissible interrogation).

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[1]The Delaware Supreme Court seemingly accepted this view. Pet. App. at 12. If accepted, it would have broad ramifications. Police requests to a suspect for fingerprints, for participation in a line-up, or for cooperation in other investigative techniques would, because they did not involve routine incidents of the custodial relationship, constitute impermissible "initiation."

3. Indeed, respondent's efforts to explain the opinion below, while distinguishing other cases, support the grant of review in this case. Echoing the position adopted by the court below, he argues that the permissibility of disclosing evidentiary information to the suspect, even if it furthers other important interests, is governed by an "evocative" switch—the conduct is impermissible if the facts disclosed are "evocative," but permissible if the facts are "innocuous." Not only does such a test break down in application, but it puts the police in the quandary of attempting to determine which facts, all sufficiently accusatory to justify the suspect's arrest, are "evocative" and which are merely "neutral." Thus, he suggests that the police may inform the suspect of the charge against him, so long as they apparently merely name the crime and do not mention any facts surrounding the cause for the arrest. Br. in Opp. at 15. But this effort to draw the "evocative" line between "charge" and "underlying evidence" has little basis in common sense. Unless this Court is willing to assume that all suspects have a working knowledge of the legal rules of felony-murder and accomplice liability, a recital to a suspect that he is charged with the robbery of a liquor store and the murder of the store clerk is just as likely to draw a response from the lookout that "he didn't kill the man" as any disclosure of a co-defendant's statement.

Indeed, respondent's efforts to distinguish *State v. Williams,* 333 S.E.2d 708, 717 (N.C. 1985) highlight the problems of this ad hoc approach. Besides his own conclusion that the delivery of search inventory returns is a procedure generally less "evocative" than disclosure of the evidentiary basis for arrest, Br. in Opp. at 24 n. 14,

respondent cannot explain how the police are to know that reiterating to the suspect their discovery of the murder weapon in the suspect's car is "innocuous" while informing him truthfully of his co-defendant's implicating statement is "evocative."

Respondent also suggests that the interests supporting disclosure of the basis for a suspect's arrest can be satisfied by providing the information only if the suspect asks for it. Br. in Opp. at 18. But that is not an adequate answer. First, according to the respondent's view, the police in that situation would have to preface any response with an additional set of *Miranda* warnings.[2] Br. in Opp. at 9. Moreover, because under the Delaware rule such factual information constitutes interrogation, a defendant would be required to waive his rights under *Miranda* as a condition to receiving information as basic as the factual predicate for his arrest. Respondent's analysis thus places *Edwards* on its head by making waiver the price for information.

4. Finally, the dilemma created by the opinion below when juxtaposed against holdings such as the one in *People v. Spring*, 713 P.2d 865 (Colo. 1985), *cert. granted*, 106 S.Ct. 1961 (1986) (No. 85-1517) is not an imagined one. Recently in *People v. Longoria*, 717 P.2d 497, 501 (Colo. 1986), the Colorado Supreme Court found that the suspect had made an intelligent waiver under *Miranda* when the police, during questioning, changed the subject of the interrogation from a rape to a robbery. The court found

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[2]Most likely, the suspect, having just asked for an attorney, would repeat that request. The police would then have to decline to answer the suspect's question. This police "refusal" to answer such a simple question would undoubtedly increase rather than decrease the suspect's anxieties.

that its ruling in *Spring* had not been violated only because the police, before beginning their questioning concerning the robbery, had informed the suspect of the nature of the new crime under investigation and outlined the evidence they had obtained which formed the basis for their accusations. 717 P.2d at 501. In contrast, a dissenting justice suggested that the validity of the waiver was subject to question because the disclosure of the evidence constituted impermissible pre-waiver "interrogation" under *Innis*. 717 P.2d at 503 n. 3 (Lohr, J., dissenting). Only this Court can clearly tell the police whether in fact they are caught between a rock and a hard spot.

B. The Factual Record

In his main thrust, respondent argues that although the issue may be important, this petition should be denied because the factual record does not support petitioner's legal position. However, when all of respondent's hyperbole is removed, the essential facts are not really subject to question. The police officer testified, without contradiction, that as part of a policy to provide such a disclosure to all arrest suspects, he told the respondent of the nature of the charge and the basis for his arrest for purposes of information. Tr. I8, 16-17, 21, 26 (Br. in Opp. App. A26, A34-35, A39, A44). The trial court in its findings never questioned the veracity of that testimony.

If, as respondent proposes, the "facts" have been muddied on appeal, the supposedly murky waters result solely from respondent's own thrashings. At the suppression hearing, respondent made the legal, and indeed factual, concession that his original remark to the detective in the parking lot outside the local courthouse was "spon-

taneous." Tr. I26-27 (Br. in Opp. App. A44-45). As the Delaware Supreme Court noted, that concession probably prompted the trial court not to undertake an inquiry into the first prong of any waiver analysis under *Edwards*. Pet. App. 9. When that motion was denied, respondent, represented by counsel chose to take the stand at trial. He then repeated to the jury the same story that he told the officer, offering that his participation in the robbery was coerced. When that explanation failed to sway the jury,[3] respondent then took a drastically different tack in his third bite at the apple of avoiding criminal liability. Suggesting to the Delaware Supreme Court that his previous concession of "spontaneity" had been wrong, he argued that his statements were the product of impermissible police coercion. However, rather than accede to the prosecution's request for a remand for further evidentiary development on this "interrogation" issue which he had now introduced, he successfully urged the Delaware Supreme Court to apply the plain error rule to a factual record developed in light of a concession he now viewed as clearly erroneous. The haze he now asserts as precluding review is a product of his own doing when he abandoned on appeal his evidentiary concession and objected to any attempt to fill the void that concession had

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[3]Although under this Court's opinion in *Harrison v. United States*, 392 U.S. 219 (1968), it appears that respondent's in-court testimony cannot legally render the *Miranda* violation harmless, his voluntary choice made with the advice of counsel to repeat, in court, the same story he gave to the police officer supports his concession during the suppression hearing that his statement was "spontaneous." *Cf. Oregon v. Elstad*, 105 S.Ct. 1285 (1985) (although initial statement was taken in violation of *Miranda*, subsequent statement which is voluntary under the totality of the circumstances is nonetheless admissible).

originally created. He should not now be permitted to utilize the haze he created to obscure the legal issue presented here.[4]

Respectfully submitted,

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[4]This Court obviously cannot interpret the application of the Delaware "plain error" doctrine. However, nothing in *Miranda* nor the concept of federalism require this Court to decline review in this case when the trial court record is uncontradicted and the legal issue important.